

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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**Case No. A-6514
APPEAL OF DEBORAH VOLLMER et al.**

OPINION OF THE BOARD

(Hearing held February 22, 2017)
(Effective Date of Opinion: March 31, 2017)

Case No. A-6514 is an administrative appeal filed January 6, 2017, by Deborah A. Vollmer, John M. Fitzgerald, and Gautam A. Prakash (the "Appellants"). Appellants charged error on the part of Montgomery County's Historic Preservation Commission ("HPC") in the December 7, 2016 decision "to approve permit requested to relocate historic structure at 7250 Wisconsin Ave." The appeal was based on HPC's grant of conditional approval of an application submitted by 7272 Wisconsin Avenue, LLC (the "Intervenor") for a Historic Area Work Permit ("HAWP") authorizing relocation of the building housing the Community Hardware and Paint/Wilson Store (the "Subject Building"), designated as a historic structure, from its location at 7250 Wisconsin Avenue in Bethesda, Maryland to a location designated as Lot 41, Bethesda, Maryland.

Pursuant to the County Code, section 2A-8 and Board Rule 3.2, the County and the Intervenor submitted a Motion for Summary Disposition of the administrative appeal on January 31, 2017, and Appellants filed an Opposition to the County's Motion on February 10, 2017. The County and the Intervenor submitted a Reply to Appellants' Opposition to Motion to Dismiss on February 17, 2017. The Board, pursuant to Board Rule 3.2.5, decided the Motion for Summary Disposition at a hearing on February 22, 2017. The Appellants were represented by David W. Brown, Esquire, of Knopf & Brown. Associate County Attorney Walter E. Wilson represented Montgomery County. The Intervenor was represented Robert R. Harris, Esquire, of Lerch, Early & Brewer, Chtd.

Decision of the Board: Motion for Summary Disposition **granted**;
Administrative appeal **dismissed**.

RECITATION OF FACTS

The Board finds, based on undisputed evidence in the record, that:

1. Intervenor filed an application with DPS and HPC on October 26, 2016 for a HAWP to relocate the Subject Building at 7250 Wisconsin Avenue, Case #35/14-007A. See Exhibit 6(b). Appellant Vollmer testified in opposition of the proposed relocation at the HPC's hearing on the application on December 7, 2016. See Exhibit 8, Corrected Affidavit of Deborah A. Vollmer. Appellants Fitzgerald and Prakash submitted comments to the HPC in opposition of the HAWP for consideration at the HPC's October 5, 2016 meeting. See Exhibit 8, ex. 2.

2. On December 7, 2016, the HPC approved the Intervenor's HAWP, with conditions, for relocation of the Subject Building. See Exhibit 3.

3. Appellant Vollmer resides at 7202 44th Street in Chevy Chase, Maryland. Appellant Fitzgerald resides at 4502 Elm Street in Chevy Chase, Maryland. Appellant Prakash resides at 4720 Montgomery Lane in Bethesda, Maryland. See Exhibit 6(b).

MOTION FOR SUMMARY DISPOSITION—SUMMARY OF ARGUMENTS

1. Counsel for the Intervenor argued that an appeal of a decision of the HPC is governed by the Montgomery County Code, § 24A-7(h)(1), which provides that only an "aggrieved party" may appeal a decision of the HPC. He argued that a long line of Maryland cases have construed what the term "aggrieved" means. Counsel argued that, pursuant to *Bryniarski v. Montgomery County Board of Appeals*, 247 Md. 137 (1967), the standard in order to have standing in this appeal is that the appellant must have been a party to the action and must have a personal or property interest that is specific and different from that of the general public.

Counsel for the Intervenor further argued that the Board had reviewed and applied the aforementioned standard for standing in a prior case, the Appeal of Marcia Stickel, George French, and Wayne Goldsein, Case Number A-5022, Resolution adopted September 22, 1998. He argued that in the *Stickel* appeal, local residents had appealed issuance of a HAWP permit. In that case, the Board confirmed that *Bryniarski* is the standard for appeals of a HAWP permit. The Board found that the appellants in *Stickel* had occasion to visit and view the structure at issue, the Silver Spring Armory, but that such actions did not constitute a special aggrievement under the County Code, and

therefore the appellants lacked standing to appeal issuance of the HAWP permit.

Counsel argued that Appellants here argue that the Board should ignore their prior case in *Stickel* as well as the line of cases following *Bryniarski*. He argued that the appellants in *Stickel* made the same arguments and cited the same cases that Appellants are now citing, but Appellants are looking for a different result than the Board found in *Stickel*.

Counsel for the Intervenor argued Appellants do not come close to having a property interest in this case. He argued that all of the properties Appellants reside in are well beyond the sight and sound of the Subject Property, and therefore Appellants do not have a property interest affected. He argued that the Appellants are well beyond the distance to be specially aggrieved, and that the Appellants admit the HAWP will have no impact on their property interests.

Counsel further argued that the Appellants are claiming a general interest in historic preservation and in seeing the Subject Property. He argued that Appellant Vollmer alleges that she has memories of the building from decades ago, which was before half of the building was demolished and the other half was moved and transformed into uses other than a hardware store. He argued that Subject Property was a hardware store, then a bank. Counsel argued that the fact that Appellants used to visit the Subject Property when it was a hardware store is not an adequate claim for standing, and that no Maryland case would allow standing on such a superficial claim. He argued that an interest in historic preservation would apply to hundreds of people.

Counsel for the Intervenor argued that in *Cylburn Arboretum Association v. Mayor and City Council of Baltimore*, 106 Md. App. 183 (1995), the appellants, an association, had much more of an interest in the property than the Appellants in this case. He argued that the *Cylburn* appellants were organized to take care of and occupy part of the property, and that they planted and maintained trees and spent hundreds or even thousands of hours working at the property. Yet even in that case, Counsel for the Intervenors argued, the court found that the appellants did not have sufficient standing to appeal.

Counsel argued that in *Committee for Responsible Development on 25th Street v. Mayor and City Council of Baltimore*, 137 Md. App. 60 (2001), the appellants claimed that they frequently went by a building and that they wanted to see the building remain. He argued that the court found that the appellants' claims were not different than the claims of the public at large, and thus the appellants lacked standing.

Counsel for the Intervenor further argued that a property interest is the primary way for a party to establish standing, but it is not the only way, a party may also have a personal interest. He argued that in this case, the statute specifically says "aggrieved." He argued that the cases relied upon by the Appellants concern statutes where the standard is "interested party" rather than "aggrieved." Counsel further argued that the Express Powers Act, found in the Annotated Code of Maryland, Local Government Article, § 10-305(a)(4), authorizes counties to grant powers to the Board, and says what the Board may, but not must, do. He argued that Montgomery County can create a standard of an aggrieved party narrower than the interested party standard authorized under State law (the Express Powers Act). Counsel argued that *Chesapeake Bay Foundation, Inc. v. DCW Dutchship Island, LLC*, 439 Md. 588 (2014) found that there can be a distinction between the Express Powers Act and what standard the counties apply for standing.

Counsel for Intervenor further argued that the authorization in section 24A-7(h)(1) calls for "aggrieved." Therefore, an appellant is limited to the aggrieved party standard in order to have standing. He argued that *DCW Dutchship Island, LLC* held that "[t]he County's ability to set reasonable conditions precedent to access to its Board of Appeals is an exercise of its Home Rule." He argued that the case found that the counties have the right to draw boundaries more narrowly than the State, which is what the County has done in this case. Counsel argued that in *Sugarloaf Citizens' Association v. Department of Environment*, 344 Md. 271 (1996), the court found that the County can be more restrictive and thus can require a party to be aggrieved to have standing, not just be interested.

2. Counsel for the County argued that a generalized interest in historic preservation does not confer standing. He argued that under *Bryniarski*, the decision must effect a property interest and an appellant must be specially affected in a manner different than the general public.

Counsel further argued that beyond the Express Powers Act, the Montgomery County Code, section 24A-7(h)(1) is consistent with State law. He argued that the Annotated Code of Maryland, Land Use Article, § 8-308, which creates the HPC, states that "[a]ny person aggrieved by a decision of a commission may appeal the decision..." Counsel argued that in order to be aggrieved, a party must have an interest different than that of the general public. Counsel for the County argued that standing in this case is governed by State law, not federal law, and that federal standing is entirely different. He argued that the Annotated Code of Maryland, Local Government Article, § 10-305, cited by Appellants, governs the creation of the Board.

Counsel for the County argued that Appellants' affidavits indicate that they visit, view, and appreciate the historic site in this case, the Subject

Property. He argued that any member of the public can also do so. He argued that this is not the first time this site has been moved, and that Appellants can go and view the new location in downtown Bethesda.

3. Counsel for the Appellants argued that proceedings before the Board are administrative proceedings, not actions for judicial review of an agency action. He argued that the Board reviews decisions of the HPC *de novo*, and decides questions of both fact and law. Counsel argued that Maryland case law is clear that the requirements to be a party to an administrative proceeding are low, a party need only show up and voice their concerns. He argued that to then take a case to court for judicial review, a party must be aggrieved.

Counsel for the Appellants further argued that a hearing before the Board is not a court hearing, and that a standing argument that a party is not aggrieved is made for the purposes of judicial review. He argued that there is not one Maryland case wherein a court has required a judicial level of aggrievement in order to be a party before the Board.

Counsel for the Appellants argued that pursuant to *Chesapeake Bay Foundation v. Clickner*, 192 Md. App. 172 (2010), the Board can't apply an aggrieved standard even when limited by County law to the aggrieved standard. He argued that the Express Powers Act establishes interested persons as the standard for standing, and that is the standard to appeal to the Board. He argued that the Board dismissed the *Stickel* appeal for lack of standing in 1998 prior to the *Clickner* decision.

Counsel for the Appellants further argued that in the *Stickel* appeal, the argument concerned whether the parties met the aggrieved standard to take an appeal to court. He argued that in this case, the Express Powers Act standard of interested person should control because this is an administrative appeal, not a court appeal.

Counsel further argued that the HPC treated Appellants Fitzgerald and Prakash as parties. He argued that *DCW Dutchship Island, LLC* did not question whether an interested person standard was a broader standard than an aggrieved person standard or whether applying a judicial review standard was applicable. He argued that the case law cited by the Intervenor and the County concerned zoning cases, which is not relevant to a historic preservation case.

Counsel for the Appellants argued that courts have recognized other ways to establish standing other than a generalized interest. He questioned that if the standard is not interested persons in front of the Board, who would be able to come before the Board to argue that the HPC had made a mistake.

He argued that the Intervenor and the County were trying to strip the Board of jurisdiction in this case.

In response to questions from the Board, Counsel for the Appellants argued that the term "aggrieved" in section 24A-7(h)(1) must be looked at in light of the enabling legislation, that is, the Express Powers Act. He argued that the Express Powers Act authorizes the Board to hear appeals by any interested party. Counsel further argued that if County law is inconsistent with State law, then County law must give way to the standard in State law for appeals of an agency action. Counsel argued that it is not unreasonable to require a party to be a party before the HPC in order to appeal, and Appellants have met that requirement here. He argued that the County can't take that requirement a step further and narrow appellate standing before the Board in a way expressly in conflict with the Express Powers Act.

Counsel for the Appellants argued that the Local Government Article, section 10-305 is what is controlling in this case, and that sets out an interested person standard for appeal to the Board. He argued that the values associated with an appeal of a zoning case concern proximity, while an appeal of a historic preservation case could concern persons who reside across town who are concerned about historic preservation. He argued that Maryland courts are beginning to understand that historic preservation cases have a broader understanding of standing.

Counsel for Appellants argued that the Appellants' affidavits, attached to Exhibit 8, show that the three Appellants differ in their interest and concern in historic preservation. He argued that not every person took the time to go before the HPC, and that sets the Appellants apart from the general public.

CONCLUSIONS OF LAW

1. Section 2-112(c) of the Montgomery County Code provides the Board of Appeals with appellate jurisdiction over appeals taken under specified sections and chapters of the Montgomery County Code, including section 24A-7.

2. Section 2A-2(d) of the Montgomery County Code provides that the provisions in Chapter 2A govern appeals and petitions charging error in the grant or denial of any permit or license or from any order of any department or agency of the County government, exclusive of variances and special exceptions, appealable to the County Board of Appeals, as set forth in Section 2-112, Article V, Chapter 2, as amended, or the Montgomery County Zoning Ordinance or any other law, ordinance or regulation providing for an appeal to said board from an adverse governmental action.

3. Section 24A-7 of the County Code, "Historic area work permits-Application procedures; appeals," reads as follows:

Sec. 24A-7. Historic area work permits-Application procedures; appeals.

(a) Applications. An applicant for an historic area work permit must file an application with the Director. The application must contain all information the Commission requires to evaluate the application under this Chapter.

(b) Referral of application. Within 3 days after the application is complete, the Director must forward the application to the Commission for review.

(c) Public meeting. When the Commission receives the application, the Commission must schedule a public meeting to consider the application.

(d) Notice. The Commission must notify the Director and any citizen or organization that the Commission reasonably determines has an interest in the application of the time and place of the public meeting.

(e) Conduct of Commission meeting. The public meeting on the application must be informal and formal rules of evidence do not apply. The Commission must encourage interested parties to comment and must keep minutes of the proceedings on the application.

(f) Action by the Commission.

(1) The Commission must make a public decision on the application under paragraph (2) not later than 45 days after the applicant files the application or 15 days after the Commission closes the record on the application, whichever is earlier.

(2) The Commission must instruct the Director to issue or deny the permit. The Commission may require the Director to issue the permit with reasonable conditions necessary to assure that work under the permit does not harm the historical, architectural, archeological or cultural value of the historic resource.

(3) If the Commission instructs the Director to deny the permit, the Commission must notify the applicant in writing why the Commission denied the application.

(4) The commission must instruct the Director to issue the permit if the Commission finds that:

(A) denial of the permit would prevent the reasonable use of the property or impose undue hardship on the owner; and

(B) within 120 days after the finding in subparagraph (A), no person seeking preservation has submitted an economically feasible plan for preserving the structure.

(5) If the Commission does not act on an application within the time periods provided in this subsection, the application is approved, unless the applicant agrees to extend the deadline for Commission action.

(g) Miscellaneous provisions.

(1) The applicant for a permit has the burden of production and persuasion on all issues the Commission determines. If another historic preservation organization holds a deed of easement for the property in the application, the applicant must submit proof to the Commission that the organization conducted an exterior architectural review and approved the action for which the applicant is seeking a permit.

(2) (A) The Commission may, by regulations issued under method (2), delegate authority to a County employee qualified in historic preservation and assigned to staff the Commission to review and approve an application for work that commonly has no more than an insignificant effect on an historic resource.

(B) The regulations:

(i) must describe the types of work that staff can review and approve, and require the Commission to review any application that is not clearly subject to staff approval; and

(ii) may waive the public meeting and notice requirements of subsections (c) and (d) for applications clearly subject to staff approval.

(C) If the staff denies or does not act on an application within 5 days after the Commission received the application from the Director, the Commission must review the application de novo.

(D) Staff must report monthly to the Commission and each appropriate Local Advisory Panel about any application reviewed by the staff in the previous month, including the disposition of the application.

(3) A permit may impose conditions that require waiver of a provision of the building code if the waiver is allowed under the "historic structures" provision of the building code adopted under Section 8-14 and the code inspector determines that waiver is appropriate for the specific work covered by the permit.

(4) The Director must enforce this Chapter.

(h) Appeal.

(1) Within 30 days after the Commission makes a public decision on an application, an aggrieved party may appeal the Commission's decision to the Board of Appeals, which must review the decision de novo. The Board of Appeals may affirm, modify, or reverse any order or decision of the Commission.

(2) A party may appeal a decision of the Board of Appeals under Section 2-114.

4. The Annotated Code of Maryland, Local Government Article, section 10-305(a), provides "[a] county may enact local laws to provide for: (1) the establishment of a county board of appeals, whose members shall be appointed by the county legislative body;

- (2) the number, qualifications, terms, and compensation of the members of the county board of appeals;
- (3) the adoption by the county board of appeals of rules of practice that govern its proceedings; and
- (4) a decision by the county board of appeals on petition of any interested person, after notice and opportunity for hearing, on the basis of a record before the board."

5. The Annotated Code of Maryland, Land Use Article, section 8-308, provides that "[a]ny person aggrieved by a decision of a commission may appeal the decision in the manner provided for an appeal from the decision of the planning commission of the local jurisdiction.

6. Under section 2A-8 of the Montgomery County Code, the Board has the authority to rule upon motions and to regulate the course of the hearing. Pursuant to that section, it is customary for the Board to dispose of outstanding preliminary motions at the outset of or prior to the hearing. Board Rule 3.2 specifically confers on the Board the ability to grant Motions to Dismiss for Summary Disposition in cases where there is no genuine issue of material fact and dismissal should be rendered as a matter of law (Rule 3.2.2).

7. The Board finds that in order to have standing to appeal a decision of the HPC under the County Code, section 24A-7(h)(1), a party must be "aggrieved" and that, pursuant to the cases cited by the Intervenor and the County, the County had the authority to set the threshold for standing as an aggrieved party to appeal rather than an interested party. The Board further finds that none of the Appellants were an aggrieved party in this case and thus all of the Appellants lack standing to appeal the HPC decision in this case. Specifically, the Appellants do not allege that they have a property interest to confer standing. Appellants allege in their affidavits that they visit, view, and appreciate the Subject Property, and that they have an interest in historic preservation. The Board finds, pursuant to *In Committee for Responsible Development on 25th Street*, 137 Md. App. 60, and *Cylburn Arboretum Association*, 106 Md. App. 183, that these are generalized interests, not specific interests sufficient to constitute an aggrieved party with standing to appeal.

8. The County's Motion for Summary Disposition in Case A-6514 is granted, and the appeal in Case A-6514 is consequently **DISMISSED**.

On a motion by Vice Chair John H. Pentecost, seconded by Member Edwin S. Rosado, with Chair Carolyn J. Shawaker and Members Stanley B. Boyd and Bruce Goldensohn in agreement, the Board voted 5 to 0 to dismiss the administrative appeal and adopt the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.


Carolyn J. Shawaker
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 31st day of March, 2017.


Barbara Jay
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure (see Section 2-114 of the County Code).